

Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of: |) | |
| |) | |
| Mountain Broadcasting Corporation (WMBC-TV) |) | CSC-396 |
| |) | |
| v. |) | |
| |) | |
| DirecTV |) | |
| |) | |
| Request for Mandatory Carriage of |) | |
| Television Station WMBC-TV, |) | |
| Newton, New Jersey |) | |

MEMORANDUM OPINION AND ORDER

Adopted: May 8, 2006

Released: May 9, 2006

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Mountain Broadcasting Corporation, licensee of television broadcast station WMBC-TV, Newton, New Jersey (WMBC) filed an Emergency Petition for Order to Show Cause why DirecTV’s termination of carriage of WMBC on its direct broadcast satellite system (DBS) is not a violation of Sections 76.66 and 76.1601 of the Commission’s rules.¹ We will treat WMBC’s petition as a complaint for carriage on DirecTV’s satellite system. DirecTV filed an Opposition to WMBC’s complaint, and WMBC submitted a Reply to Opposition and Reply Comments. For the reasons discussed below, we deny WMBC’s complaint.

II. BACKGROUND

2. Section 338(a)(1) of the Communications Act of 1934,² adopted as part of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”),³ requires direct broadcast satellite (DBS) carriers to carry upon request all local television broadcast stations’ signals in local markets in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license.⁴ A station’s market for satellite carriage purposes is its Designated Market Area, or DMA, as defined by

¹Emergency Petition at 1 and 3, *citing* 47 C.F.R. §76.66 (regulates satellite carriage of television stations) and 76.1601 (requires cable systems to provide 30 days notice before ceasing carriage of a television station).

²47 U.S.C. §338(a)(1).

³Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁴47 U.S.C. §338.

Nielson Media Research.⁵

3. In November 2000, the Commission adopted rules to implement the carriage provisions contained in Section 338.⁶ Under the Commission's broadcast signal carriage rules, a satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA that has made a timely election for mandatory carriage for a specified election cycle.⁷ The first election cycle was for a four year period starting January 1, 2002 and ending December 31, 2005. The second election cycle is for a three year period beginning January 1, 2006 and terminating December 31, 2008. Television broadcast stations were required to make a carriage election for the second election cycle by October 1, 2005.⁸ Satellite carriers, moreover, are "not required to carry a television station, for the duration of the election cycle, if the station fails to assert its carriage rights by the deadlines established."⁹

III. DISCUSSION

4. WMBC explains in its Petition that in June 2001 it notified DirecTV that it elected mandatory carriage of its signal on DirecTV's satellite system in the New York DMA, and that it did not specify a termination date for this election.¹⁰ WMBC further explains that on December 21, 2005, it wrote DirecTV granting it retransmission consent for the carriage of its signal.¹¹ WMBC indicates that DirecTV responded on December 28 that it was removing WMBC from its channel lineup on January 1, 2006 because DirecTV had not received an election letter by the October 1, 2005 Commission deadline for the second election cycle beginning on January 1, 2006. WMBC claims that its mandatory carriage election in June 2001 was still in effect and that DirecTV is obligated to continue to carry its signal.¹² WMBC also objects that it was not given at least 30 days advance notice that DirecTV was deleting its station as required by Section 76.1601 of Commission's rules.¹³ WMBC asserts, moreover, that DirecTV's refusal to carry its programming is unlawful discrimination because DirecTV carries other programming services affiliated with it, for example, two television stations also located in the New York DMA that are owned by DirecTV's parent corporation, News Corporation.¹⁴ Further, WMBC contends

⁵An DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. 17 U.S.C. §122(j)(2)(A)-(C).

⁶*Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, 1934 (2000) ("DBS Mandatory Carriage Report & Order"). The Commission subsequently affirmed and clarified its satellite carriage rules. *Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 (2001) ("DBS Mandatory Carriage Reconsideration Order").

⁷47 C.F.R. §76.66. A satellite carrier provides "local-into-local" satellite service when it retransmits a local television signal back into the local market of that television station for reception by subscribers. 47 C.F.R. §76.66(a)(6).

⁸47 C.F.R. §76.66(c).

⁹47 C.F.R. §76.66(d)(1)(v).

¹⁰Emergency Petition at 1.

¹¹*Id.* at 1-2.

¹²*Id.* at 2.

¹³*Id.* at 3.

¹⁴*Id.* at 3-4.

that DirecTV's refusal to enter into retransmission consent negotiations with WMBC violates Commission rules requiring good faith negotiations.¹⁵ Finally, WMBC appears to indicate that if the Commission finds that its June 2001 mandatory carriage election is no longer in effect, then WMBC should have must carry status on DirecTV's system by default because of "DirecTV's flat refusal to enter into any retransmission consent negotiations."¹⁶

5. DirecTV in its Opposition to WMBC's Petition states that the Commission's rules make clear that television stations are required to make an election by specified deadlines regarding carriage by satellite providers, and that WMBC failed to conform with this requirement, which resulted in the lapse of its carriage rights.¹⁷ DirecTV also asserts that it was not required by Section 76.1601 of the Commission's rules to provide 30 days notice before terminating WMBC's carriage because this rule expressly applies to cable television operators.¹⁸ Further, DirecTV claims that it is not discriminating against WMBC in favor of affiliated programming services because WMBC's loss of carriage rights was the result of its own failure to comply with Commission rules.¹⁹ Finally, DirecTV explains that it has not refused to negotiate carriage rights with WMBC, that it offered to negotiate the day after WMBC submitted its petition, and that negotiations are occurring.²⁰

6. WMBC in its Reply to Opposition and Reply Comments restates, in general, its arguments in its Petition. With regard to DirecTV's claim that it has initiated negotiations for carriage, WMBC explains that these are not good faith negotiations because DirecTV is seeking over \$1,500,000 per month for carriage, WMBC is unable to "afford such a usurious rate," and DirecTV knew this offer "would be rejected."²¹

7. What has happened here is that WMBC simply failed to perfect its must carry rights on DirecTV's system. In this regard, WMBC failed to submit an election request by October 1, 2005 as required by the Commission in Section 76.66(c) of its rules. Consequently, we deny WMBC's petition for a Show Cause Order directing DirecTV to commence carriage of WMBC. Section 76.66 of the Commission's rules, governing the carriage of television signals by satellite carriers, states that the first election cycle for satellite carriage began on January 1, 2002 for a four year period ending on December 31, 2005.²² The termination of this election period, on December 31, 2005, was set out in Section 76.66 of the rules. Moreover, DirecTV was not required to provide 30 days prior notice before terminating service, since Section 76.1601 of the rules is applicable on its face only to cable systems.²³ Section 76.66

¹⁵*Id.* at 4, *citing* 47 C.F.R. §76.65.

¹⁶*Id.* at 4.

¹⁷Opposition at 2-5.

¹⁸*Id.* at 5-6.

¹⁹*Id.* at 7-8.

²⁰*Id.* at 8-9.

²¹Reply to Opposition at 4-5. On April 12, 2006, WMBC submitted "Additional Comments." WMBC claims it is receiving viewer complaints because it is no longer carried on DirecTV. Further, WMBC claims that DirecTV is misleading its customers by telling them that WMBC did not elect carriage by the deadline, and by not informing customers that WMBC had granted retransmission consent to DirecTV.

²²47 C.F.R. §76.66(c)(1), *see also* *DBS Mandatory Carriage Report & Order*, 16 FCC Rcd at 1922 and 1928.

²³ 47 C.F.R. §76.1601. Requires a "cable operator" to give 30 days notice before deleting a station.

requires that “commercial television broadcast stations shall make their retransmission consent-mandatory carriage election by October 1st of the year preceding the new cycle.”²⁴ Thus, WMBC was required to make an election by October 1, 2005 for the relevant election period beginning January 1, 2006.²⁵ WMBC failed to meet this deadline. The process described above is meant to ensure that satellite carriers will have adequate notice regarding which stations have requested carriage, and to allow carriers to timely plan their signal carriage complement. The fact that WMBC made a prior must carry election for an earlier cycle has no effect in the current election cycle. Finally, Section 76.66 states that if a television station “fails to assert its carriage rights by the deadline established,” a “satellite carrier is not required to carry” the station during the election cycle.²⁶ WMBC failed to follow these requirements, and, therefore, has no right to assert mandatory carriage during this election cycle.

8. A commercial television station, however, that fails to make an election regarding satellite carriage defaults to retransmission consent status.²⁷ WMBC indicates that it has entered into retransmission consent negotiations with DirecTV, during which WMBC maintains that DirecTV has failed to negotiate in good faith as required by Section 76.65 of the Commission’s rules.²⁸ If WMBC believes that DirecTV has not met its obligations under the Commission’s rules, it may file a complaint with the Commission. If WMBC files a complaint, it should fully state the facts and circumstances surrounding its allegations.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act of 1934, as amended, 47 U.S.C. § 338, and Section 76.66 of the Commission’s rules, 47 C.F.R. §76.66, that the Petition filed by Mountain Broadcasting Corporation (WMBC) for mandatory carriage against DirecTV **IS DENIED**.

10. This action is taken under authority delegated by Section 0.283 of the Commission’s rules, 47 C.F.R. §0.283.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief
Media Bureau

²⁴47 C.F.R. §76.66(c)(4), *see also DBS Mandatory Carriage Report & Order*, 16 FCC Rcd at 1922 and 1929.

²⁵47 C.F.R. §76.66(c)(2), *see also DBS Mandatory Carriage Report & Order*, 16 FCC Rcd at 1929.

²⁶47 C.F.R. §76.66(d)(1)(v), *see also DBS Mandatory Carriage Report & Order*, 16 FCC Rcd at 1929.

²⁷”[I]f a commercial television station does not make an election, it defaults to retransmission consent.” *DBS Mandatory Carriage Report & Order*, 16 FCC Rcd at 1929.

²⁸47 C.F.R. §76.65.